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# In the Supreme Court of the United States

OCTOBER TERM, 1965.

No. 331

CLARENCE COLEMAN,
*Petitioner,*

vs.

JAMES McGETTRICK,
Sheriff of Cuyahoga County, Ohio,
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Ohio.

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THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—PHONE: 621-5847

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*Respondent.*

## PETITION FOR WRIT OF CERTIORARI
## To the Supreme Court of Ohio.

*To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States of America:*

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio entered in this cause on May 19, 1965, denying the petitioner's application for a writ of habeas corpus.

## OPINIONS BELOW.

The order of the Supreme Court of Ohio denying the application for a writ of habeas corpus is printed in Appendix A, *infra*, p. 10. The per curiam opinion of the court is reported at 2 Ohio St. 2d 177 (May 19, 1965) and is printed in Appendix B, *infra*, pp. 10-15. (This opinion originally was the Report of the Master Commissioners, but was adopted by the Supreme Court as its opinion.)

## JURISDICTION.

The judgment of the Ohio Supreme Court was entered on May 19, 1965. The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(3), since the validity of state constitutional procedure and statutory provisions have been construed by The Supreme Court of Ohio, in this cause, in a manner that deprives the petitioner of rights guaranteed him by the due process and equal protection clauses of the federal constitution.

## QUESTIONS PRESENTED.

1. Where an appeal from a conviction raises substantial federal questions, can a state court deny bail on any basis other than the likelihood that the appellant will abscond or the community endangered.

2. Where the execution of an indeterminate sentence of 1-7 years is suspended pending appeal, and there is every likelihood that a period in excess to the minimum sentence will have expired before an appeal to the intermediate court of appeals is determined—and surely will have expired long before all of the appellate remedies have been exhausted—can a court empowered to review such denial, do so by resort to "the presumption of regularity that adheres to all judicial proceedings."

3. Where no reasons are expressed for the denial of bail on appeal, and no sound reasons are apparent as to why bail should not be allowed, does such denial constitute denial of due process of law in violation of the Fourteenth Amendment to the United States Constitution.

4. Whether state procedure that authorizes bail on appeal denies an accused equal protection of the law if he can be denied bail on the basis of the exercise of arbitrary discretion.

5. Whether the prosecution, or the appellant, has the burden of showing why bail on appeal should, or should not, be allowed.

## CONSTITUTIONAL PROVISIONS WHICH THE CASE INVOLVES.

The pertinent portions of the provisions of the United States Constitution here involved are set forth below:

"* * * No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the U. S.; *nor shall any state deprive any person of life, liberty or property without due process of law;* nor deny to any person within its jurisdiction *the equal protection of the law.*" (Amendment XIV, U. S. Constitution.)

"Excessive bail shall not be required, nor excessive fines imposed nor cruel and unusual punishments inflicted." (Amendment VIII, U. S. Constitution.)

## STATEMENT OF THE CASE.

Petitioner was indicted, tried and convicted of violating § 2953.10, R. C. of Ohio, which section prohibits the receiving of stolen property.

Following this conviction of January 28, 1965, petitioner seasonably concluded all of the steps essential to having this conviction reviewed by the Ohio Court of Appeals. Also, following this conviction, and within the statutory period, petitioner sought a new trial on the basis of newly discovered evidence. This latter motion contained the serious allegations that evidence beneficial to the accused has been wilfully suppressed by the prosecution, and that evidence ordered suppressed by the court, as the product of an illegal search, was surreptitiously used by the state as a basis for discovering other evidence, the production of which had not "become so attenuated as to dissipate the taint."

The denial of this latter motion constitutes a separate appeal, also duly filed and perfected by the petitioner, who,

in doing so, scrupulously complied with all of the deadlines for the filing of the required papers. On the other hand, all of the delays that have occasioned the hearing of these appeals have been caused by the state, which despite the rules of the appellate court, has not filed any responses to the appeals.

Following his conviction petitioner, who had prior to trial been at large on a bail of $1000.00, made proper applications that he be allowed bail pending appeal. These applications were denied both by the trial court and the court of appeals. (*Coleman v. McGettrick*, 2 Ohio St. 177.)

Following these unsupported denials, petitioner originated the action for which this review is being sought in the Supreme Court of Ohio, by way of an original application for a writ of habeas corpus.

In his petition before the Supreme Court of Ohio, it was alleged, among other things:

"* * *

6. That for aught that appears and based on the State's oral argument to the Court of Appeals the petitioner has been denied bail on the basis of a determination other than (a) whether or not the appeal being taken is frivolous, or (b) that there is a likelihood that he will abscond.

7. That the appeal being taken in this cause is not frivolous and does present substantial questions. More than that, it involves questions, yet unanswered by an Ohio Court, in the light of the recent holding by the United States Supreme Court as to the permissible use that can be made of illegally obtained evidence (—i.e., can it be for any purpose, or once suppressed can the State make an undisclosed use of such evidence in its quest for evidence of guilt).

8. That among the questions presented by this appeal is the propriety of certain comments by counsel

for the state, which although patently improper—designedly, wilfully and artificially created the impression that the petitioner was identified, by the thief, as the person to whom he sold the stolen television after he (the thief) had been shown police photographs of several known drug addicts and pushers, which argument, although sanctioned by the court in denying our objection, cannot be squared either with the facts, or the requirements of a fair trial.

* * *

10. That petitioner having applied unsuccessfully for bail to the trial judge, as well as to the Court of Appeals (which applications were denied for unexpressed reasons) such denials are tantamount to a denial of "due process."

11. That it is apparent under these circumstances, and based on the time involved in exhausting the appeals available, it would be appropriate that bail be allowed during the necessary interim. Otherwise, in view of the substantial questions involved, the petitioner could very well be imprisoned for a considerable time on the basis of a conviction that may prove to be invalid.

12. That to deny bail where, as here, there are substantial questions, is to deny "equal protection" of the law, which authorizes bail on appeal in some cases, but denies such to him. And especially so, where such denial is based on a statute that does not set forth a standard for either granting or the denying of bail."

The respondent's answer to the above allegations was devoted to the single premise, adopted by the court in its opinion (that is, the matter of bail on appeal is strictly a matter of the discretion of the courts. And that there is no constitutional right to bail on appeal).

## ARGUMENTS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

### I.

As was argued to the Supreme Court of Ohio (which adopted as its opinion, the Report of the Master Commissioners) unless the opinion is being misread, what is being said is that "in any case where the Court of Appeals denies bail on the basis of reasons known only to them: [the Supreme] Court should and will assume that the court's denial was proper." Of course the fault characteristic in the view expressed by the Supreme Court of Ohio—which relies on the arbitrary "presumption of regularity which adheres in all judicial proceedings (*id.*, at 180)—is that it conclusively places an undeserved premium on those denials that are not supported by reasoning.

Surely this Court will agree with the argument made below, by petitioner, that "a right sense of justice dictates that such unclad determinations ought not be entitled to greater weight than a determination based on express reasoning." Because, "if nothing else, an express determination permits scrutiny; whereas without any articulation, how is it to be known whether or not the denial was based on certain ingrained conceptions (or misconceptions * * *) and predispositions toward a given set of facts."

As was recognized in the opinion below, petitioner "contends that he is raising substantial [federal] questions in his appeal, that there is no danger of his absconding, that there is no sound basis for the denial of bail, and, thus that he should be allowed bail" (*Id.*, at 180).

At the outset, nowhere in the respondent's papers or in the opinions has there been even the suggestion that the appeal is frivolous or that it lacks substantial questions. The Supreme Court of Ohio resolved the contention that

there are substantial questions involved by merely recognizing it as a contention and then ignoring it.

But can it be ignored, in such a summary fashion, when the question of bail on appeal is being considered. Surely it does not suffice to say, as was said below, that to be entitled to the type of relief being sought by this petitioner he must overcome "the presumption of regularity which adheres to all judicial proceedings" and convince them that there was a "patent abuse of such discretion" before they will disturb a decision denying bail. (*Ibid.*)

## II.

Again it is contended that because of the denial of bail the petitioner, who has already been confined since January 28, 1965, may have to spend more time in jail on what may be a void conviction than the minimum time he would have to serve under the sentence itself, which he doubtless would have done but for a desire to exercise his appeal as of right. Thus, for aught that appears he is being penalized because he sought to question the propriety of his conviction.

In our judgment, this amounts to cruel and unusual punishment with the prosecution of the Eighth Amendment. And it was so argued below.

## III.

Quite apart from the above considerations, it is our further contention that this cause presents an apt fact situation for the determination (1) as to what are the relevant factors that must be determined before bail can be allowed or disallowed. And (2) as to who has the burden of making the relevant showing.

## CONCLUSION.

For the foregoing reasons it is therefore respectfully requested that a writ of certiorari be issued under seal of this Court to the Supreme Court of Ohio to the end that the judgment of that Court may be reviewed and reversed. Further the petitioner request, that should certiorari be allowed that the court advance this cause for an immediate hearing on the merits.

Respectfully submitted,

JAMES R. WILLIS,
1404 East Ninth Street, # 202,
Cleveland, Ohio,
*Attorney for Petitioner.*

## APPENDIX A.

### JOURNAL ENTRY OF THE SUPREME COURT OF OHIO.

(May 19, 1965.)

This cause was considered by the Court on the petition, answer of respondent, briefs, report of master commissioners and petitioner's exceptions. On consideration whereof, it is ordered by the Court that, for the reasons set forth in the opinion rendered in this Case, the petitioner is hereby remanded to custody.

## APPENDIX B.

### OPINION OF THE SUPREME COURT OF OHIO.

(Decided May 19, 1965.)

IN HABEAS CORPUS.

This is an action in habeas corpus originating in this court. On January 28, 1965, petitioner, Clarence Coleman, was convicted of the crime of receiving stolen property. Section 2907.30, Revised Code. A motion for a new trial on the ground of newly discovered evidence was filed and overruled. Petitioner presently is prosecuting an appeal both from the overruling of the motion for a new trial and from his judgment of conviction. Petitioner is now in the custody of the Cuyahoga County sheriff. The execution of his sentence was suspended, but both the Court of Common Pleas and the Court of Appeals refused to grant him bail pending the appeal. Petitioner was on bail prior to his conviction.

It is the refusal of the courts to grant bail pending the appeal which gives rise to this present proceeding.

MR. JAMES R. WILLIS, for petitioner.

MR. JOHN T. CORRIGAN, prosecuting attorney, and MR. GEORGE J. MOSCARINO, for respondent.

PER CURIAM. Petitioner urges that the denial of bail on appeal constitutes a denial of due process. He argues that he is raising substantial federal questions in his appeal which may well cause a reversal of his conviction, and because of the denial of bail he may well have to spend more time in jail on what may be held to be a void conviction than the minimum time he would have to serve under the sentence itself. Basically, he contends that the denial of bail actually denies him his right to appeal. Petitioner points out that he was free on bail prior to his conviction and did not abscond, so that there is no reason to believe that he would abscond if released on bail pending the appeal.

It is his contention that a substantial reason must exist before bail can be denied on appeal, and that a denial without such reason fails to comply with the minimum standards of justice required by the due process and equal protection clauses of the Constitution of the United States. He argues that the granting of bail in some cases on appeal while denying it in others where there is a substantial question raised on appeal denies an accused equal protection. He urges that bail cannot be denied arbitrarily and that, in the absence of an opinion by the Court of Appeals, there is nothing to indicate anything except that the court denied bail either because the state wished it so or for some unsubstantial reason. He contends that the denial of bail without a finding that there is no substantial reason for the appeal or a finding that the petitioner is likely to abscond if placed on bail violates both the due process and equal protection clauses of the Constitution of the United States.

Respondent, in answer to petitioner's contentions, points out that there is no constitutional right to bail after conviction and pending appeal, and that the granting of bail on appeal is within the sound discretion of the court.

It would appear that respondent's argument is well taken.

Section 2949.02, Revised Code, provides:

"When a person has been convicted of any bailable offense, including the violation of an ordinance of a municipal corporation, in the Court of Common Pleas or by any court or magistrate inferior to the Court of Common Pleas, and such person gives notice in writing to the trial judge or magistrate of his intention to file, or apply for leave to file a petition to review such conviction, such judge or magistrate may suspend execution of the sentence or judgment for such fixed time as will give the accused time to prepare and file, or to apply for leave to file such petition. In all bailable cases, except those in which the punishment is imprisonment for life, such judge may release the defendant upon a recognizance with sufficient surety to be approved by the judge or magistrate, conditioned that the accused will appeal without delay and abide by the judgment and sentence of the court."

Section 2953.09, Revised Code, provides:

"Upon filing an appeal in the Supreme Court, the execution of sentence in cases of felony is suspended. Appeals in other courts shall not suspend execution of sentence, except in capital cases where such suspension must be for good cause shown, on motion and on notice to the prosecuting attorney of the proper county, ordered by a majority of the judges of the Court of Appeals of the county, and in other cases in such court by one judge thereof, and in cases in the Court of Common Pleas by one of the judges thereof.

"In all bailable cases, except those in which the

punishment is imprisonment for life, the trial judge may release the defendant upon a recognizance with sufficient surety to be approved by the judge or magistrate, conditioned that the accused will appeal without delay and abide by the judgment and sentence of the court."

Section 2953.10, Revised Code, provides:

"The Court of Common Pleas, Court of Appeals, or Supreme Court, or any judge thereof, to which court an appeal is taken from an inferior tribunal, has the same power and authority to suspend the execution of sentence during the pendency of such appeal and admit the defendant to bail as is provided for in respect to said inferior tribunal."

Thus, under the provisions of these sections, the granting of bail is strictly within the discretion of the courts. There is no bail on appeal as a matter of right.

In *In re Thorpe,* 132 Ohio St. 119, the first and second paragraphs of the syllabus read as follows:

"1. The provisions of Article I, Section 9 of the Ohio Constitution, guaranteeing the right to bail, are not effective subsequent to judgment of conviction in the trial court. (*In re Halsey,* 124 Ohio St. 318, approved and followed.)

"2. One convicted of a felony is not entitled as a matter of right to be admitted to bail or to have execution of sentence suspended pending appeal of such judgment of conviction in a reviewing court; but the trial court is authorized by Section 13453-1, General Code [2949.02, Revised Code], to suspend execution of sentence and release the defendant upon approved recognizance pending such appeal."

There is a sound basis for making the granting of bail a right prior to conviction but a matter of the court's discretion after conviction. Prior to conviction, an accused is

afforded the benefit of the presumption of innocence, the burden being upon the state to prove his guilt. After conviction such presumption no longer exists; the accused has been found guilty, and the burden is then upon convicted felon to prove such conviction erroneous.

As pointed out above, the release of an accused on bail after conviction and pending appeal is not a matter of right but a question to be resolved by an exercise of the sound discretion of the court. Only if there is a patent abuse of such discretion should the decision of the court denying bail be disturbed.

Petitioner, in the instant case, has shown no such abuse of discretion. He contends that he is raising substantial questions in his appeal, that there is no danger of his absconding, that there was no sound basis for the denial of bail, and, thus, that he should be granted bail.

To follow petitioner's argument that the Court of Appeals had no sound ground for denying bail, we would have to assume that, because the Court of Appeals rendered no written opinion in its denial of bail, it has no grounds for such denial but acted purely arbitrarily. This is the assumption urged on us by petitioner. Such assumption cannot validly be made. To do so would be to ignore the presumption of regularity which adheres to all judicial proceedings.

Petitioner has made application for bail to both the Court of Common Pleas and the Court of Appeals and has been denied bail by both. According to the brief of respondent, at least in the Court of Appeals, petitioner's extensive prior record of arrests and convictions was examined, and the question as to whether a substantial question was raised on the appeal was considered. It was only after this examination that the bail was denied.

Under such facts, we cannot find any abuse of discretion in the action of the courts denying bail.

Petitioner remanded to custody.

TAFT, C.J., ZIMMERMAN, MATTHIAS, O'NEILL, HERBERT SCHNEIDER and BROWN, JJ., concur.

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## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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*To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:*

### OBJECTIONS TO JURISDICTION.

There is no substantial federal question involved which would require this Court to review this case.

The Supreme Court of Ohio decided this case (2 Ohio St. 2d 177) in accordance with the statutes of the State of Ohio and in accordance with the Constitution of the United States and the applicable decisions of this Court. There is therefore no substantial federal question involved.

### QUESTION PRESENTED.

Petitioner contends the denial of bail pending appeal of his conviction of a felony in the state court constitutes denial of due process in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

## STATEMENT OF THE CASE.

The petition herein results from an original action for a writ of habeas corpus filed in the Supreme Court of Ohio and decided May 19, 1965. The opinion of the Court is printed in full as Appendix B of the petition herein.

Clarence Coleman, the petitioner, on January 28th, 1965, was found guilty of receiving stolen property, under the felony provision of Ohio Revised Code Section 2907.30. Petitioner has a long history with the FBI and the local police authorities in Ohio. Aside from numerous arrests, his record of conviction is:

> July 10, 1942 Convicted in Detroit, Mich. on charge of violating Dyer Act.
>
> Feb. 16, 1948 Convicted in Cleveland, Ohio, Federal Dist. Court, violation of Harrison Act, sentenced to Federal Penitentiary, Milan, Mich.
>
> June 9, 1950 Convicted in Cleveland, Ohio, of possession of marijuana, sentenced to Ohio Penitentiary.
>
> Feb. 15, 1954 Convicted of violation of Harrison Act, sentenced to Federal Penitentiary at Atlanta, Ga.
>
> July 25, 1958 Convicted of clearing house violation, Cleveland, Ohio; sent to County Jail.
>
> Sept. 30, 1959 Convicted in Cleveland, Ohio, of carrying concealed weapon, sentenced to Ohio Penitentiary.
>
> Jan. 28, 1965 Convicted of receiving stolen property, sentenced to Ohio Penitentiary.

After petitioner's conviction of receiving stolen property, both Common Pleas Court and the Court of Appeals for Cuyahoga County refused to admit the petitioner to bail. At a hearing before three judges of the Court of Appeals the record of petitioner's convictions and arrests was examined, as was the question of whether substantial

questions would be presented in the appeal of his conviction and what the future conduct of Coleman might be in relation to the possibility of his committing future crimes while at large on bail.

## ARGUMENT.

The sole question presented by the petition herein is whether a state court after the conviction of an accused can deny bond pending appeal of that conviction. In Ohio the law is settled that bail is not a right that must be granted pending appeal, and the Ohio courts have so held. The Supreme Court of Ohio dealt with this question in *In re Thorpe* (habeas corpus), 132 O. S. 119. The first and second syllabi hold:

> "1. The provisions of Article I, Section 9 of the Ohio Constitution guaranteeing the right to bail, are not effective subsequent to judgment of conviction in the trial court. (In re Halsey, 124 Ohio St. 318, approved and followed.)
>
> 2. One convicted of a felony is not entitled as a matter of right to be admitted to bail or to have execution of sentence suspended pending appeal of such judgment of conviction in a reviewing court; but the trial court is authorized by Section 13453-1, General Code, to suspend execution of sentence and release the defendant upon approved recognizance pending such appeal."

In the opinion, by Matthias, *J.*, it is stated:

> "There is no contention that any right to a suspension of execution of sentence and admission to bail pending an appeal proceeding is conferred by any constitutional provision. That any such contention would not be well founded has been specifically held by this court in the case of *In re Halsey,* 124 Ohio St., 318, 178 N. E. 271, 77 A. L. R. 1232, in the following

proposition of the syllabus: *'Section 9 of the Ohio Bill of Rights guarantees the right to bail only before judgment of conviction in the trial court.'"* (Emphasis added.)

The federal court decisions likewise fail to support the position of the petitioner in the case at bar.

Rule 46(a) of the Federal Rules of Criminal Procedure is found in Title 18, United States Code Annotated, at page 320. Section (2) of that rule states the federal provision as to bail pending appeal as follows:

> "(2) *Upon Review.* Bail may be allowed pending appeal or certiorari unless it appears that the appeal is frivolous or taken for delay. Pending appeal to a court of appeals, bail may be allowed by the trial judge, by the court of appeals, or by any judge thereof or by the circuit justice, to run until final termination of the proceedings in all courts. Pending appeal or certiorari to the Supreme Court, bail may be allowed by the court of appeals or by any judge thereof or by the Supreme Court or by a Justice thereof. Any court or any judge or justice authorized to grant bail may at any time revoke the order admitting the defendant to bail. As amended Apr. 9, 1956, eff. July 8, 1956."

The language of this rule and the cases set forth in the annotation clearly hold that the position of the petitioner is untenable, not only under the Ohio decisions heretofore cited but likewise under the decisions of the federal courts and the United States Supreme Court. Bail pending appeal is not a right but a discretionary matter to be decided by the trial or appellate courts.

At p. 331, under Rule 46, 18 U. S. C. A., are cited cases that discuss bail upon review generally. It is clear from a perusal of these cases that bail is not a mandatory right but a discretionary privilege pending appeal. In

*Ward v. United States* (1956), 76 S. Ct. 1063, 1 L. ed. 2d 23, it is held:

> "Under this rule providing that bail may be allowed pending appeal or certiorari unless it appears that appeal is frivolous or taken for delay, there may be considerations other than frivolity or delay which will justify denial of bail."

The federal cases hold that there are instances where a denial of bail may be justified. It is held in *Rhodes v. U. S.* (C. A. W. Va. 1960), 275 F. 2d 78, that:

> "On application for bail pending appeal from judgment of conviction, some of questions to be considered are whether appeal is insubstantial or frivolous, whether there is a real danger of defendant fleeing, *whether defendant has committed prior offenses* and *whether defendant will commit additional offenses if enlarged on bail.*" (Emphasis added.)

The Ohio courts have recognized that it is proper for the court to consider the record of the accused, whether there is a likelihood of his going on to commit other crimes while out on bail, whether there is any danger that he will flee, and many other circumstances, in deciding whether bail should be allowed. Very recently the Supreme Court of Ohio, in *Colavecchio v. McGettrick* (2 Ohio St. 2d 290) (decided June 23, 1965), referred to *Coleman v. McGettrick* (the case at bar), pointed out that release on bail pending an appeal is not a matter of right but lies within the sound discretion of the reviewing court, and that the Court, in an action in habeas corpus, will not interfere with the exercise of such discretion unless there appears to have been a gross abuse thereof. The opinion states that the possibility that the person seeking bail may abscond during the time he is at large is only one of the factors which must be taken into consideration in granting or

denying bail, and that the conduct of an accused in relation to the possibility of his committing further crimes while at large on bail may well enter into the consideration of the court.

In *Rehman v. California*, 13 L. ed. 2d 17, 85 S. Ct. __, there was decided the question of bond for a doctor convicted in California, who had been allowed bail on appeal in the state courts if he would post bond and surrender his license to practice medicine. His petition for certiorari challenged the right of the state court to take away his doctor's license pending appeal. Mr. Justice Douglas entered an order lifting the condition of bail that the doctor surrender his license to practice. Thereafter the state court refused all bail on the ground that he was a menace to the community and would not allow him to remain on bail if he had the privilege of practicing medicine. When the case again came to this Court, Mr. Justice Douglas stated in the decision:

> "Subsequent to the entry of my order, the State sought an affirmative answer to this underlying question by filing a motion with the trial judge for a revocation of bail. After a hearing on the motion the judge * * * denied all bail and remanded the applicant to custody, acting on the basis that 'to permit Dr. Rehman to remain on bail pending appeal constitutes an immediate, clear and present danger imperiling, jeopardizing and threatening the health, safety, and welfare of the community.' "

The opinion refers to the statement in *Carbo v. United States*, 7 L. ed. 2d 769, 774, 82 Sup. Ct. 662, 666, that "If * * * the safety of the community would be jeopardized, it would be irresponsible judicial action to grant bail." The opinion concludes:

> I am unable to say that the trial judge acted in abuse of his power and that there is no evidence to support his findings.

## CONCLUSION.

The Ohio Supreme Court has held that under the facts in this case there was no abuse of discretion in the action of the courts denying bail. The petitioner has not cited any authority in support of his position that the denial of bail pending appeal constitutes a deprivation of constitutional rights entitling him to review by this Court. The writ should therefore be denied.

Respectfully submitted,

JOHN T. CORRIGAN,
*Prosecuting Attorney of Cuyahoga County, Ohio,*

GEORGE J. MOSCARINO,
*Assistant Prosecuting Attorney,*
*Attorneys for Respondent.*

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## REPLY BRIEF OF PETITIONER TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Respondent's Brief in Opposition to Petition For Writ of Certiorari, in its statement of facts, contains the following statement:

> "* * * At a hearing before three judges of the Court of Appeals the record of petitioner's convictions and arrests was examined, as was the question of whether substantial questions would be presented in the appeal of his conviction and what the future conduct of Coleman might be in relation to the possibility of his committing future crimes while at large on bail."

It is at once apparent that the quoted statement was designed to suggest (1) that there was a formal hearing; (2) that the Court did something other than read petitioner's "Application for Bail" and listen to petitioner's counsel, who was the only person in the court that day who even discussed the substantiality of the questions

raised in the appeal. The fact is, however, counsel for the respondent was content to argue the efficacy of the denial of bail from the single premise that: "The denial of bail was made subsequent to petitioner's conviction for a felony against the State of Ohio, the petitioner does not have any constitutional right to bail." (See Answer of Respondent, in the Supreme Court of Ohio, page 3.)

Further, and important here, another fact is, in the cause before this Court, the record does not support the belated assertion—made for the first time by respondent, in his "Brief in Opposition" (pp. 2-3), that the questions involved in petitioner's appeal are not substantial. At least this much is certain: respondent, in his defense to this action before the Supreme Court of Ohio, did not meet this issue with even an assertion that such questions were not substantial within the purview of the due process clauses.

## I.

Of course, it is an uncontrovertible fact that the federal questions related to petitioner's state court conviction are substantial. They involve the wilful suppression of evidence by the prosecution. Additionally, the appeal involves the unentitled use of evidence that had been ordered suppressed as the product of an illegal search and seizure; also, it involves other questions (including but not limited to those set forth in the Petition before this Court). Surely to assert, as is done by respondent in his "Brief in Opposition," that the questions are not substantial, especially since most of them have not been resolved by any court—to say nothing of the Supreme Court of Ohio—is to attempt a conjuration of the facts before this Court in a desperate attempt to defeat valid contentions being raised by a wronged accused.

## II.

But in this cause that is not all, such argument as is now being advanced by respondent exposes, far more eloquently than could ever be argued, the danger that exists when constitutional determinations are approved on the basis of "the presumption of regularity which adheres to all judicial proceedings" (*Coleman v. McGettrick*, 2 Ohio St., at 180). Further it cannot be denied, as was previously argued by petitioner, "if nothing else, an express determination permits scrutiny; whereas without articulation, how is it to be known whether or not the denial [of bail] was based on certain ingrained conceptions (or misconceptions) and predispositions toward a given set of facts." (See Petition, page 7.) Again, the fault characteristic, to which this argument is being directed, is that the respondent *now* would torture the facts to the conclusion that: the Court in denying the bail perforce took into consideration petitioner's substantial questions argument.

The short answer to this, of course, is if the court had stated its basis for denying bail there would be no need to speculate, as respondent has done, and as he will continue to do, in comparable situations involving comparable rights.

## CONCLUSION.

For the foregoing reasons, as well as for the reasons set forth in his petition for writ of certiorari, petitioner renews his prayer that the petition for writ be granted. Further, petitioner again requests because of the nature of his cause, that should certiorari be granted, an immediate hearing on the merits be allowed.

Respectfully submitted,

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